Supreme Court, U.S.
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No. ———

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

K.D.H.,

Petitioner,

v.

K. M.,

Respondent.

On Petition for a Writ of Certiorari to the Alabama Court of Civil Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Act No. 94-633, codified at Alabama Code 1975 § 26-17A-1, conferring upon defendant fathers to a paternity action, to the exclusion of all other parties, a right to reopen said paternity action upon proof of scientific evidence is unconstitutional and violative of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether Act No. 94-633, permitting a defendant father to reopen a previously adjudicated paternity action and without any time limitation upon proof of scientific evidence, is unconstitutional and violative of the firmly established doctrine of res judicata.

3. Whether Act. No. 94-633, constitutes an abuse of power by the Alabama legislature, violative of the separation of powers doctrine, by unilaterally passing legislation authorizing the reopening of a paternity adjudications with proof of scientific evidence even after a final judgment by the courts.

LIST OF PARTIES

1) E.M.B, Petitioner

2) K.M, Respondent

3) G.H., mother of Petitioner

4) State of Alabama

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No. ____

In The

Supreme Court of the United States

October Term, 1996

K. M.,

Petitioner,

v.

G. H.,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Civil Appeals

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, E.B.M., respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Civil Appeals in this case in regard to the first constitutional challenge to the state statute Ala. Code, 1975, § 26-17A-1.

OPINIONS BELOW

The historical background of this action is set out in *E.B.M. v. V.W.*, 586 So.2d 230 (Ala.Civ.App. 1991) (App. A, infra, A1-6). The decision of the Juvenile Court of Jefferson County, Alabama dated November 30, 1994 (App. B, infra, B1-9) is unreported. The Alabama Court of Civil Appeals decision (App. C, infra, C1-28), dated August 25, 1995, is reported at *K.M. v. G.H.*, No. 2940266, 1995 WL 502476 (Ala.Civ.App. Aug. 25, 1995). The Certificate of Judgment of the Supreme Court of Alabama is dated June 14, 1996 (App. D, infra, D1).

JURISDICTION

On November 30, 1994, the Juvenile Court of Jefferson County, Alabama, Birmingham Division, entered an Order holding that Act No. 94-633, codified at Ala. Code, 1975, § 26-17A-1 is unconstitutional as violative of the Equal Protection Clause. The Alabama Court of Civil Appeals reversed this judgment on August 25, 1995. The State and Petitioner's Application for Rehearing were denied on October 13, 1995. The State and Petitioner's Petition for Writ of Certiorari to the Supreme Court of Alabama was granted on January 26, 1996, and subsequently quashed on June 14, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Act No. 94-633, Ala. Acts 1994, codified at Ala. Code, 1975, § 26-17A-1 provides in relevant part: "(a) Upon petition of the defendant in a paternity proceeding where the defendant has been declared the legal father, the case shall be reopened if there is scientific evidence presented by the defendant that he is not the father. The

court shall admit into evidence any scientific test recognized by the court that has been conducted in accordance with established scientific principles or the court may order a blood test, or a Deoxyribose Nucleic Acid test of the mother, father, and child. ...."

STATEMENT OF THE CASE

The historical background of this action is set out in the Alabama Court of Civil Appeals' opinion styled *E.B.M. v. V.W.*, 586 So.2d 230 (Ala.Civ.App. 1991). Said opinion recites that the State of Alabama ex rel. G.H., the mother of Petitioner, filed a paternity petition against the Respondent, K.M., on January 10, 1986. On May 9, 1986, the Respondent acknowledged paternity in open court. Accordingly, a judgment of paternity and a determination of child support was entered by the Juvenile Court of Jefferson County, Alabama. No appeal was taken by the Respondent.

More than one year later, the Respondent filed a Motion for Relief from Judgment and, subsequently, a Motion to Set Aside the Judgment. After a guardian ad litem was appointed for the Petitioner, these motions were denied and Respondent again failed to file a timely appeal.

On January 24, 1990, a Petition for Rule Nisi was filed against the Respondent, who then entered into an agreement with the mother, G.H., on the issue of child support. This agreement was ratified by the Juvenile Court, and no appeal was taken.

On March 22, 1990, a new petition styled as a petition by the minor child, the Petitioner herein, through her paternal grandparents was filed in the Juvenile Court of Jefferson County, Alabama. The Complaint alleged that the Respondent was not the father of the Petitioner. The court referee ordered all parties to submit to a blood test. The State, on behalf of the mother, filed a motion

for relief from the court referee's order alleging that the issue of the child's parentage was res judicata. The Juvenile Court subsequently issued an order declaring that the paternity of the Petitioner child was res judicata and the mother's motion to set aside the referee's order was granted. The paternity petition was dismissed.

On appeal, styled as *E.B.M. v. V.W.*, 586 So.2d 230 (Ala.Civ.App. 1991), the Court of Civil Appeals applied the doctrine of *res judicata* and noted (1) that the child was a party to the earlier proceedings and was now precluded from bringing another action to re-litigate the issue of paternity, and (2) that the laws of this state have historically sought to provide means whereby a child born out of wedlock may establish his or her legitimacy and reap the benefits thereof, not undo the legitimacy and bastardize the child.

On April 26, 1994, the Governor signed into law Act No. 94-633, now codified at Ala. Code, 1975, § 26-17A-1 and -2. The initiation and sponsorship of the bill was by the Respondent's father, a State Senator, who had also, for a time, been involved in the underlying litigation. On April 29, 1994, eight years after the Respondent admitted paternity and was determined to be the father, the Respondent's attorney served upon G.H. and the Department of Human Resources a Petition to Reopen Paternity Action, and subsequently filed his petition in the Family Court, Bessemer Division, on May 3, 1994.

Both the State and the guardian ad litem filed motions challenging the petition and the constitutionality of the subject Act.

By order entered on November 30, 1994, and amended on December 16, 1994, the trial court held that Act No. 94-633 unconstitutionally violated the public policy of this state favoring the legitimacy of children; that the Act denied equal protection of the laws; and that, in an interstate case, the Act placed the Alabama

trial courts in the untenable dilemma of either violating the statute or violating the Full Faith and Credit Clause of the United States Constitution. However, the court held that the statute was not so vague or ambiguous as to render it unconstitutional, and further that Article IV, § 95, of the *Alabama Constitution of 1901* did not prohibit the retroactive application of the Act.

From these orders, the Respondent appealed. The State cross-appealed for the sole purpose of including in the appeal the issue of the retroactive application of the Act as a violation of the *Alabama Constitution of 1901.*

The Alabama Court of Civil Appeals reversed the judgment of the trial court, holding specifically that the Act did not violate public policy, that it did not violate equal protection of the laws, that it was intended to be applied retroactively and should be so applied, and that there was a lack of standing to challenge the constitutionality of the Act based on the Full Faith and Credit Clause.

However, in his carefully reasoned dissent, Judge Crawley stated that in his opinion the Act subverts the principle of res judicata, denies equal protection of the laws to other similarly situated individuals, and violates the separation of powers provisions of the Alabama Constitution.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Holds as Constitutional a State Statute which is Violative of the Equal Protection Clause of the Fourteenth Amendment. This is the First Challenge of the Constitutionality of this Law.

The opinion of the Alabama Court of Civil Appeals, upholding the constitutionality of Act No. 94-633, codified at Ala. Code, 1975, § 26-17A-1, erroneously validates a statute which clearly denies equal protection of the laws in violation of the protections afforded under the Four-

teenth Amendment. Said statute provides, in pertinent part, as follows:

> (a) Upon petition of the defendant in a paternity proceeding where the defendant has been declared the legal father, the case shall be reopened if there is scientific evidence presented by the defendant that he is not the father. The court shall admit into evidence any scientific test recognized by the court that has been conducted in accordance with established scientific principles or the court may order a blood test, or a Deoxyribose Nucleic Acid test of the mother, father, and child. ....

Ala. Code, 1975, § 26-17A-1.

The language of the challenged statute clearly creates an arbitrary classification without providing any material or substantial distinctions which are substantially related to the policy sought to be implemented; to remedy the injustice of erroneous paternity adjudications. Specifically, the challenged statute as drafted is under-inclusive, permitting only "defendant fathers" the right to challenge the determination of paternity to the exclusion of mothers, children, plaintiff fathers and the state. The statute has not only established a gender-based classification denying mothers the opportunity to challenge paternity determinations, but has also denied plaintiff fathers, children and the state the opportunity to challenge the underlying judgment.

The Alabama Court of Civil Appeals, erroneously holding that the statute does not violate equal protection principles, emphasized that equal protection of the laws does not require that all be treated alike, but merely that all "similarly situated" be treated alike. Based upon said requisite, the Court of Appeals incorrectly reasoned that all defendants previously declared the legal father of a child and who possess scientific evidence negating such a

determination are similarly situated; and therefore, the principle of equal protection has not been violated. Under the Court of Civil Appeals' flawed reasoning, almost any classification would pass constitutional muster, as long as all individuals who fall within the legislative classification were treated alike. However, the Court of Civil Appeals failed to apply the appropriate standard. Under equal protection analysis, the challenged classification, at a minimum, must be reasonable and not arbitrary, and must bear a rational relationship to a legitimate governmental interest. *See e.g, Frontiero v. Richardson*, 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct 1764 (1973). Furthermore, in some instances where the statute employs a classification based upon sex or legitimacy of birth, a heightened scrutiny is applied requiring that the classification be substantially related to a sufficiently important governmental interest. *See e.g., Clark v. Jeter*, 486 U.S. 456 (1988); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

The Court of Appeals' decision erroneously defined those "similarly situated" too narrowly, encompassing only defendant fathers who have been declared the legal father of a child and who have scientific evidence that they are not the child's father. *K.M. v. G.H.*, No. 2940266, 1995 WL 502476 at * 3 (Ala.Civ.App. Aug. 25, 1995). However, the carefully reasoned dissenting opinion by Judge Crawley correctly defines those "similarly situated" as "at the very least, those persons who were parties to a prior paternity proceeding in which the outcome is contradicted by scientific evidence." *K.M. v. G.H.* at *7.

Judge Crawley's dissent further illustrates the equal protection dilemma created by the challenged Act, stating:

> A plaintiff mother or child who has scientific proof that a man found not to be the father in a prior paternity action is in fact the father, is

> "identically situated" with a defendant who has been declared the legal father of a child but has scientific evidence that he is not the father. . . . By allowing only the defendant to establish the justice of his claim, however, the Act treats a former paternity defendant (a male) differently from a former paternity plaintiff (most often a female or an illegitimate child).

K.M. v. G.H. at *7,8.

The challenged statute, at best, bestows a right only to some of the parties to a paternity proceeding, namely male defendants, to come back at any time in the future and challenge that paternity determination. The statute grants a right to men that it denies to women and children. The statute unlawfully discriminates against mothers and illegitimate children by singling out " the defendant in a paternity proceeding where the defendant has been declared the legal father . . . if there is scientific evidence . . . that he is not the father" upon whom to bestow a right to reopen his case any number of years after a judgment of paternity is entered against him. This right is unconstitutionally denied to all other litigants to a paternity action. Regardless of gender or legitimacy, it is without debate that all parties to a paternity action are similarly situated with respect to the stated objective of the Act. By providing and fostering dissimilar treatment for "defendant fathers" to the exclusion of mothers, children, plaintiff fathers, and the state, the challenged Act clearly runs afoul of the protections afforded all individuals by the Equal Protection Clause.

In the context of equal protection jurisprudence, it is well established that both gender bias and legitimacy are considered quasi-suspect classifications. *See Craig v. Boren*, 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct 451 (1976); *Clark v. Jeter*, 486 U.S. 456, 100 L.Ed.2d 465, 108 S.Ct. 1910 (1988). Under this type of classification, an intermediate

level of scrutiny applies mandating a substantial relationship between the classification and an important governmental interest. Therefore, for the legislative classification created by Act 94-633 to be upheld, there must be an important governmental interest that is substantially related to this classification.

As stated by the majority in the Court of Civil Appeals' opinion, the objective of the Act is to remedy the injustice of erroneous paternity determinations. However, after defining such an objective, the Court of Civil Appeals provides absolutely no justification underlying the differential treatment accorded defendant fathers from the other parties to a paternity action; namely mothers, children, plaintiff fathers and the state. Because the legislative classification does not significantly advance the legislative goals of the Act, the classification is not substantially related to achieving those goals; consequently, the Act denies equal protection of the laws to the excluded class of litigants.

In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), this Court stated that a party seeking to uphold a statute that classifies individuals on the basis of their gender

> "must carry the burden of showing an 'exceedingly persuasive justification' for the classification . . . The burden is met only by showing that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"

Mississippi University for Women, 458 U.S. at 724. Such a burden clearly has not been met in this case. The classification established by the challenged Act cannot even pass rational basis scrutiny, let alone the heightened scrutiny required when a classification is restricted by gender

or illegitimacy as in the present case. The Alabama Court of Civil Appeals proffers no reason substantially related to the policy of re-opening paternity cases based on scientific evidence to demonstrate why only defendant fathers, and not plaintiff fathers, mothers, children or the state, should be allowed to make such a challenge. This classification is arbitrary, not substantially related to the policy sought to be implemented, and denies equal protection of the laws. Consequently, as stated in Judge Crawley's dissent, "[b]ecause the legislative classification does not significantly advance the legislative goals of the Act, the classification is not substantially related to achieving those goals, and the Act denies equal protection to the excluded categories of litigants." *K.M. v. G.H.* at * 8.

Furthermore, an attempt to remedy the deficiencies in the under-inclusive nature of the challenged statute's classification would not correct its constitutional infirmity, as said statute fails to comport with the firmly established principle of res judicata. There is no more reason to provide relief for erroneous determinations in a paternity suit than there is in an action in tort or contract. To broaden the category to include all such individuals in any given action would serve to potentially subject all judgments to challenge at any time in the future, and thereby remain violative of the doctrine of res judicata.

II. The Decision Below is Violative of the Doctrine of Separation of Powers.

The decision of the Alabama Court of Civil Appeals, as succinctly stated in Judge Crawley's dissent, violates the principles underlying Article III, §§ 42 and 43, of the Alabama Constitution of 1901, as well as the long established separation of powers doctrine.

Section 42 provides:

> "The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Section 43 provides:

> "in the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

In direct contradiction to such laws, the challenged Act directs that "[u]pon petition of the defendant in a paternity proceeding where the defendant has been declared the legal father, the case shall be reopened if there is scientific evidence presented by the defendant that he is not the father." Ala. Code, 1975, § 26-17A-1.

The validity of the proposition that a legislature cannot order a court to reopen a final judgment and grant a new trial is further recognized by the Federal Rules of Civil Procedure, providing:

> "The separation of powers doctrine precludes a state legislature from invading the province of the state judiciary by annulling, modifying, or impairing a final judgment rendered by a court of competent jurisdiction of that state."

J. Moore, 1B *Moore's Federal Practice*, ¶ 0.0406[2] at 281 (2d ed. 1991). Furthermore, numerous longstanding

court decisions throughout the country reaffirm the long ago established separation of powers doctrine. In *Ratcliffe v. Anderson*, 31 Gratt. 105, 72 Va. 105 (1878) the Virginia Court of Appeals, striking down an act which authorized the reopening of judgments rendered since March 3, 1866, stated:

> "Both in principle and authority I conclude that the legislature has no right, directly or indirectly, to annul in whole or in part a judgment or decree of a court already rendered, or to authorize the courts to reopen and rehear judgments and decrees already final, by which the rights of the parties are finally adjudicated, . . . and that every such attempt of legislative action is plainly an invasion of judicial power, and therefore unconstitutional and void."

31 Gratt. at 111, 72 Va. at ___.

In direct contradiction to the action the Virginia Court's decision was designed to prevent, the Respondent's father has utilized his position as a state legislator to promote and gain passage of a statute which would offer a means to negate a final order, adverse to the Respondent's interest, entered by a court of competent jurisdiction.

In another firmly established decision, *Lawson v. Jeffries*, 47 Miss. 686, 12 Am. Rep. 342 (1873), the Mississippi Supreme Court, holding that a legislative ordinance violated the separation of powers doctrine of the state and federal constitutions, concluded, in pertinent part:

> "'If a review of such judgments may be ordered for one cause, it may be equally so for another, or any cause within the discretion of the legislature.' . . . If a legislative body may grant a new trial, it may order a continuance, annul a judgment, suspend a trial, direct the judgment to be entered, and otherwise interfere with the discre-

> tion and independence of the judiciary. The evils that would flow from such an assertion of legislative power are too apparent to be enumerated. . . . "

47 Miss. at 701, 704, 12 Am. Rep. at 351, 353.

The dissenting opinion by Judge Crawley cites *Merrill v. Sherburne*, 1 Adams 199, 8 Am. Dec. 52 (N.H. 1818), yet another firmly established decision, recognizing and upholding the separation of powers doctrine. In *Merrill*, the New Hampshire Court examined the constitutionality of a statute granting a new trial to the losing party to a probate proceeding. In concluding that the challenged act was a violation of the separation of powers doctrine, the Court explained:

> "One prominent reason for creating the judicial distinct from the . . . legislative department, was that the former might determine when laws were thus 'repugnant [or contrary to the constitution],' and so operate as a check upon the latter, and as a safeguard to the people against its mistakes or encroachments. But the judiciary would in every respect cease to be a check on the legislature if the legislature could at pleasure revise or alter any of the judgments of the judiciary. The legislature, too, would thus become the court of last resort, 'the superior court,' or 'supreme judicial' tribunal of the state . . . "

Merrill, 1 Adams at ___, 8 Am. Dec. at 57-58, 61-62.

The Petitioner acknowledges that the issue of separation of powers was not raised in the trial court nor argued in the original briefs before the Court of Civil Appeals. As pointed out in Judge Crawley's dissent, quoting *Armstrong v. Rogers Outdoor Sports, Inc.*, 581 So.2d 414, 416 (Ala. 1991), "[N]ormally, a court will not hold a statute unconstitutional except on a basis specifically argued by

a party and necessarily presented in the case." However, the *Armstrong* Court determined that although the appellant had not raised the constitutional provisions of §§ 42 and 43 as grounds for overturning the statutes which were challenged in that case, it would consider the issue because "[i]f the portions of these section that we have quoted above violate the principle of separation of powers, that violation affirmatively intrudes into the judicial process even though §§ 42 and 43 of the Constitution have not been argued." 581 So.2d at 416.

Similar decisions have been reached by appellate courts of other states whose Constitutions provide for a separation of powers. As stated in *Jenkins v. Jenkins*, 233 Ga. 902, 214 S.E.2d 368 (1975), "[t]he legislature has no constitutional power to construe or alter judgments." *Jenkins*, 214 S.E.2d at ___. "The judgment of a court must stand as final. It can be reversed, modified or superseded only by judicial process. . . . The legislature cannot 'supersede' a judgment of a court by its direct declaration to that effect." *Spinelli v. Commonwealth*, 393 Mass. 240, 470 N.E.2d 795, 796 (1984). *See also Agran v. Checker Taxi Co.*, 412 Ill. 145, 105 N.E.2d 713 (1952).

Although the foregoing cases may not at first glance appear to be the most recent decisions on the issue of the separation of powers doctrine, Judge Crawley's dissent correctly notes that few other 20th century decisions have been found holding that legislation mandating the reopening of a judgment or the granting of a new trial violates the separation of powers doctrine. *K.M. v. G.H.* at * 13. Such a scarcity of cases, as pointed out by the dissent, would indicate that the proposition is so well established that it is no longer open to debate.

As the issue of paternity is res judicata as to all parties, the legislature clearly has no power to alter or set aside such a decision. Act 94-633 clearly violates the constitutional provision for the separation of powers, and the

Court of Civil Appeals erred in failing to strike down the Act based upon that provision.

III. The Decision Below Declares the Validity of a State Statute Which is Violative of the Well-Established Principle of Res Judicata.

The opinion of the Alabama Court of Civil Appeals creates a dangerous precedent which is completely inconsistent with the well established doctrine of Res Judicata. The language of the challenged Act expressly provides "defendant fathers" the right to come back at any time to challenge the determination of paternity with results from a scientific test. Said statute places absolutely no time limitation on when such challenges may be invoked by "defendant fathers." Consequently, the effect of the statute enables adjudicated fathers the opportunity to challenge paternity many years or even decades after the fact. Further, the absence of a time constraint upon such a paternity challenge unnecessarily fosters the potential of inflicting emotional distress upon minor children who have detrimentally relied on the prior adjudication establishing paternity.

Under the principle of res judicata, a final judgment applies to bar not only issues that were previously raised and litigated, but also precludes issues that could have been raised in the prior action. *Rye v. U.S. Steel Mining Co., Inc.*, 856 F.Supp. 274 (E.D.Va. 1994) (citing *United States v. Tatum*, 943 F.2d 370,381 (4th Cir. 1991) Consequently, an action cannot be re-litigated between the same parties upon any ground, thereby mandating that a former judgment will be binding even though erroneous. *Rye*, 856 F.Supp. 274 (E.D.Va. 1994); *see Thomas v. Consolidation Coal Co.*, 380 F.2d 69, 80 (4th Cir.)

Public policy throughout the United States favors the finality of judgments. *See Federated Department Stores, Inc. v.*

Moitie, 452 U.S. 394, 69 L.Ed.2d 103, 101 S.Ct. 2424 (1981). In rejecting an argument similar to that of the Respondent contending that the state statute insures public confidence in the edicts of our courts, this Court has stated:

> "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. . . . This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Mens's Assn.*, 283 U.S. 522, 525, 51 S.Ct 517, 518, 75 L.Ed. 1244 (1931). We have stressed that "[t]he doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . . " *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 507, 61 L.Ed. 1148 (1917).

Federated Department Stores, Inc. v. Moitie, 452 U.S. at 401, 101 S.Ct. at 2429.

Recently, in *Helms v. Helms' Kennels, Inc., supra*, the Alabama Supreme Court, quoting a decision by the Second Circuit, stated:

> Our society benefits from a judicial system that recognizes and respects the finality and definiteness of a trial court's "final judgment" deciding what was previously disputed and uncertain. If

> the rights of litigants were allowed to remain unsettled indefinitely, chaos would surely result. Instead, "the first and most obvious consequence of a judgment is that it establishes an indisputable obligation, and a final judgment definitely fixes the rights and liabilities of the parties in the action as to the matters submitted to the court for decision." 46 Am.Jur.2d *Judgments* 229 (1969). It has been noted:
>
> > "'Very high among the interests in our jurisprudential system is that of finality of judgments. It has become almost a judicial commonplace to say that litigation must end somewhere, and we reiterate our firm belief that courts should not encourage the reopening of final judgments or casually permit the relitigation of litigated issues out of a friendliness to claims of unfortunate failures to put in one's best case.'"
>
> *United States v. Cirami*, 563 F.2d 26 at 33 (2d Cir. 1977) (citations omitted).

Helms v. Helms' Kennels, Inc., 646 So.2d at 1347.

In the Alabama case of *Hughes v. Hughes*, 624 So.2d 198 (Ala.Civ.App. 1992), the Alabama Court of Civil Appeals ruled very differently in a case very similar to the present action. In *Hughes*, a husband agreed to legitimate a child of the wife. The parties testified to the legitimacy of the child in open court, and the probate Judge issued the legitimation decree. At the time of the divorce, the husband/father attempted to disclaim the child and have the legitimation set aside. The Probate Court refused to set aside the legitimation and the Appellate court affirmed that decision. The Court held such action to be a case of fraud upon the court. The Court went on to hold, "After receiving the important and special rights of a father, that action may not now be repudiated by the party

on the ground that the court was without authority to have given them to him." The Court denied relief under Rule 60(b), and held that the conduct of the husband in claiming the child, then later seeking to repudiate the child, was intolerable.

The Respondent herein is attempting to achieve the same goal as the father in *Hughes*. Here, as in *Hughes*, the Respondent (father) acknowledged paternity and for a period of years enjoyed the special rights and privileges of a father. If he perpetrated a fraud on the Court by declaring his fatherhood, he should not now be allowed to benefit or profit from perpetrating a fraud on the Court and for his false swearing.

By passing the challenged Act, the Alabama legislature has permitted a class of litigants the right to reopen final judgments and permitted the re-litigation of litigated issues out of an apparent friendliness to claims of those litigants' unfortunate failures to put on their best case. This is precisely what the public policy in favor of finality of judgments was developed to prevent.

The Respondent in the instant matter had ample opportunity to request a blood test and contest his paternity case when it was initially filed in 1986. Instead, the Respondent stood idly by, deliberately waiving his right to vigorously contest the issue, and he acknowledged paternity. Allowing an edict of the court as to the paternity of a child to be set aside after over eight years simply because a defendant, who had acknowledged liability in the initial action and failed to appeal said judgment, has later decided to present evidence to contest the issue does not promote public policy nor insure public confidence in the edicts of our courts. The statute not only eradicates the principle of Res Judicata in the Alabama courts, but further erases the Full Faith and Credit Doctrine in regard to paternity determinations from other jurisdictions. Nothing in this statute precludes an un-

happy Missouri, New York or Georgia defendant father from overturning his home state's paternity determination in an Alabama court. Considering the potential volume of such out-of-state challenges, the courts could be mired to the point of standstill. If this statute is allowed to pass constitutional muster, it opens the door to similar statutes throughout the country potentially creating unending chaos.

The challenged statute impermissibly affords a litigant who initially neglected to protect his interest by contesting the issue of paternity and requesting a blood test, and has failed in utilizing other available remedies, yet another opportunity to reopen his case to contest the paternity determination. Such a rule actually undermines public confidence in the edicts of our courts by subjecting final judgments to be set aside at any time. Consequently, the Act is unconstitutional in purpose and application and the decision of the Alabama Court of Civil Appeals is due to be reversed.

CONCLUSION

This statute is unconstitutional on several grounds and should not be allowed to stand.

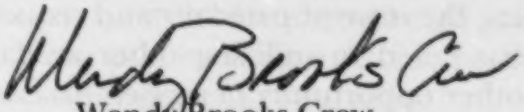
"The evils that would flow from such an assertion of legislative power are too apparent to be enumerated." Illegitimate children will forever wonder if their fathers of six, twelve or even twenty-seven years will later decide to challenge such fatherhood status. Children will also learn that their fathers (men) will have rights which are denied to them because they are children and which are denied to their mothers because they are women. Children will be unable to rely on the orders of a court because their "father" has the ability to challenge the order. Finally, children will learn that the rules and court orders

and prior case law do not necessarily apply if your father is in the state legislature.

If this statute is permitted by this Court to stand, the door stands wide open with an invitation to other state legislatures to enact such a law, potentially creating chaos for the litigants, the courts and the judiciary.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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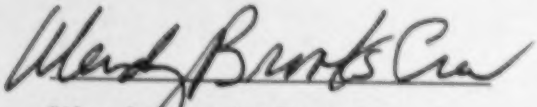
CERTIFICATE OF SERVICE

I, Wendy Brooks Crew, a member of the Bar of this Court, hereby certify that on this 12th day of September, 1996, three copies of the Petition for Writ of Certiorari were mailed to: (1) Calvin D. Biggers, Esq., 1816 3rd Avenue North, Suite C, Bessemer, Alabama 35020, counsel for the Respondent; (2) Jeff Sessions, Attorney General, State of Alabama, 11 South Union Street, Montgomery, Alabama 36130; and (3) Lois Brasfield, Esq., Assistant Attorney General, Department of Human Resources, S. Gordon Persons Building, 50 Ripley Street, Birmingham, Alabama 36130, counsel for the State of Alabama.

I further certify that all parties required to be served have been served.



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APPENDIX

A-1

E.B.M.

v.

V.W., et al.

2900332.

Court of Civil Appeals of Alabama.

June 28, 1991.

Child, through her paternal grandparents, sought order that person adjudged her father in prior paternity action was not her father. The Jefferson Family Court, Sandra Ross, J., granted mother's motion to set aside referee's order and dismissed petition, and appeal was taken. The Court of Civil Appeals, Robert P. Bradley, Retired Appellate Judge, held that present action was barred, pursuant to doctrine of res judicata, by prior judgment of paternity.

Affirmed.

1. Children Out-of-Wedlock

Doctrine of res judicata will be applicable to paternity actions where following elements are met: prior judgment was rendered by court of competent jurisdiction, prior judgment was rendered on merits, same cause of action is present in both suits, and parties to both suits are substantially identical.

2. Children Out-of-Wedlock

Child whose paternity had been determined was precluded, pursuant to doctrine of res judicata, from bringing subsequent action for order that person adjudged her father in prior action was not her father, particularly in that it appeared that subsequent action was actually brought by father in name of child, in attempt to over-

turn judgment of paternity after his post-trial motions were denied and his appeal was unsuccessful; although child was not originally made party to first adjudication of paternity, guardian ad litem was appointed to represent child when father filed postjudgment proceedings in effort to overturn decision, at which time child fought to uphold adjudication of legitimacy, and was effectively made party to action.

Victor Jackson, Gadsden, for appellant.

William Prendergast, Lois Brasfield and Mary E. Pons, Asst. Attys. Gen., for appellees.

ROBERT P. BRADLEY, Retired Appellate Judge.

This is a paternity case.

On January 10, 1986 the State of Alabama ex rel. G.H. (mother) filed a petition against K.M. in the Juvenile Court of Jefferson County, Alabama, alleging that K.M. was the natural father of K.H. On May 9, 1986 K.M. admitted to the court that he was the father of the child, and a judgment of paternity was entered.

Over a year later K.M. filed a motion for relief from the juvenile court's judgment, then filed a motion to set aside the judgment. The trial court appointed a guardian ad litem to represent the minor child in these proceedings. K.M.'s motions were subsequently denied. Two months later K.M. appealed the juvenile court's decision to the Circuit Court of Jefferson County. This appeal was subsequently dismissed as untimely.

On January 24, 1990 the mother filed a petition for rule nisi against K.M. K.M. then entered into an agreement with the mother on the issue of child support and this agreement was ratified by the juvenile court.

On March 22, 1990 a new petition for paternity was filed in the Family Court of Jefferson County to establish

the paternity of K.H. This action was styled as a petition brought by the minor, K.H., through her paternal grandparents. The action was brought against the father and others. The complaint alleged that since the time K.M. was adjudicated as the father of K.H., K.M. had undergone blood tests that excluded him as the father of K.H. The petition further alleged that V.W. had come forward to admit that he was the father of K.H. The prayer for relief requested that the court appoint a guardian ad litem to represent the minor child and enter an order that K.M. was not the father of K.H.

On June 13, 1990 a referee appointed by the family court issued an order allowing the action to be brought in the name of the minor child and appointing a guardian ad litem to represent the minor child. The order also added V.W. as defendant and required that all parties submit to a blood test.

On July 20, 1990 the mother ex rel. the State of Alabama filed a motion for relief from the court referee's order, alleging that the issue of K.H.'s parentage was res judicata.

An ore tenus proceeding on the second complaint was held in the family court on October 24, 1990. The Juvenile Court of Jefferson County subsequently issued an order stating that it had already adjudicated the issue of paternity and thus the matter was res judicata. In light of the juvenile court's order, the family court granted the mother's motion to set aside the referee's order and the petition for paternity was dismissed. The petitioner appeals.

[1] We begin by emphasizing that paternity adjudications are generally deemed to be res judicata where the issue has been properly tried to final judgment. *Coburn v. Coburn*, 474 So.2d 728 (Ala.Civ.App. 1985). The doctrine of res judicata will be applicable to paternity actions where the following elements are met: (1) the prior judg-

ment was rendered by a court of competent jurisdiction, (2) the prior judgment was rendered on the merits, (3) the same cause of action is present in both suits, and (4) the parties to both suits are substantially identical. *Ex parte Snow*, 508 So.2d 266 (Ala.1987); *Tatum v. Kelley*, 481 So.2d 1132 (Ala.1985).

[2] In the instant case, the first three elements set out above have been met. The appellant argues that the child was not a party to the first paternity action, thus the fourth element has not been met. To support this contention, the appellant cites *Ex parte Snow*. In *Snow*, an unmarried mother's unsuccessful paternity action did not bar her minor child from bringing a second petition for paternity against the same man. The child was not a party to the first proceeding. Indeed, the first petition was filed pursuant to a statute, now repealed, that did not *allow* the child to be joined as a party. The Alabama Supreme Court found that the child had certain unique interests in an adjudication of paternity that were not the same as the mother's interests. Because the mother and child did not have "privity of interest" in the first petition for paternity, and because the child had been precluded by statute from joining the first paternity action, the supreme court allowed the child to bring a second petition to protect her unique interests in legitimacy.

We find that the appellant's reliance on *Snow* is wholly misplaced here. The record in this case does indicate that the child was not originally made a party to the first adjudication of paternity. However, a guardian ad litem was appointed to represent the child when the father filed postjudgment proceedings in an effort to overturn the decision. At that time the child, through the guardian ad litem, fought to uphold the adjudication of her legitimacy and was thereby given the opportunity to protect the interests recognized in *Snow*. We therefore find that the child was effectively made a party to the action at

that time. Because she was a party to the earlier proceedings, which ended with a final judgment on the merits in a court of competent jurisdiction, the child is now precluded from bringing another action to relitigate the issue of paternity.

We are compelled to point out the most critical distinction between *Snow* and the case at bar. In *Snow*, the supreme court allowed the child to bring a second petition for paternity in an effort to protect the child's interests in legitimization. Indeed, the laws of this state have historically sought to provide means and remedies whereby a child born out of wedlock may establish his or her legitimacy and reap the benefits thereof.

In this case the child brought a second petition seeking not to legitimize herself, but to undo her legitimacy; that is, to bastardize herself. Because it is possible to imagine circumstances where bastardization proceedings would protect unique interests of the child, we do not find that a child should necessarily be precluded from bringing such an action. However, we do not find that the petition in this case was brought to protect any such interests of the child. The second petition did not seek to establish the paternity of someone other than the father. The petition did not include any prayer for relief, except relief for the father from his support obligation. The second petition was filed by the attorney who represented the father in both paternity actions. This and other evidence in the record suggests that this action was actually brought by the *father* in the name of the child, in an attempt to overturn the judgment of paternity after his posttrial motions were denied and his appeal was unsuccessful. Certainly, the doctrine of res judicata bars such an action.

In light of the specific facts in this case, the trial court properly found that it lacked jurisdiction to readjudicate

the father's paternity. There being no error in the trial court's judgment, this case is affirmed.

The foregoing opinion was prepared by Retired Appellate Judge ROBERT P. BRADLEY while serving on active duty status as a judge of this court under the provisions of § 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the Judges concur.

IN THE FAMILY COURT OF JEFFERSON COUNTY, ALABAMA

GWENDOLYN HAWKINS,
PLAINTIFF

vs.

CASE NO. JU 86000127.06

KEVIN McCLAIN, et. al.
DEFENDANTS

ORDER

This cause came on for hearing on a Petition to Reopen a Paternity Action filed by the defendant pursuant to Alabama Acts 94-633 (Act No. 94-633). Subsequently, the State of Alabama filed a Motion to Dismiss the petition and the Guardian ad Litem for the child filed a Motion to Challenge the Constitutionality of the Statute.

This court has heard oral argument of counsel and received briefs regarding the constitutionality of the Alabama Acts 94-633. Having considered same, this court finds as follows.

On April 9, 1986, this court entered an order in this cause finding the defendant, Kevin McClain, to be the father of Kenisha D. Hawkins, born on May 2, 1985. This order was entered on admission of the defendant that he was in fact the father of the child. An order of income withholding was entered that date.

On November 5, 1987, a Motion for Relief from Child Support was filed by defendant alleging that a report from the Immunogenetics Programs Department of Medicine, the University of Health Services Foundation certified that defendant was not the biological father of the minor child herein. This report was dated August 20, 1987. The motion was denied by the court on August 12, 1988.

This order of the Family Court of Jefferson County, Alabama, was then appealed to the Circuit Court of Jefferson County. A Motion to Dismiss the appeal was filed by the Guardian ad Litem for the child. This motion was granted on March 29, 1989.

A Motion to Set Aside was filed by defendant on April 12, 1989. On October 6, 1989, this motion was denied by this court.

On January 24, 1990, a Contempt Petition for Non-Payment of Child Support was filed by the State. On March 7, 1990, Defendant was found to be in contempt and allowed to purge himself by agreement of the parties regarding support.

On March 22, 1990, in Case No. CS90 000380, a new Complaint for Paternity was filed in the this court, said case being styled *Kenisha D. Hawkins, a minor, by and through E. B. McClain and Eloise McClain, grandparents, ex. rel. State of Alabama Plaintiffs, vs. Victor Williams, Kevin McClain and Persons Unknown, Defendants.* On February 2, 1991, this court entered an order in this case finding that the issues in that case were previously decided in the original paternity case in this matter and that the doctrine of *res judicata* applied. This second complaint for paternity was dismissed. An appeal of that order was taken to the Alabama Court of Civil Appeal and this court's order was affirmed on June 28, 1991.

On August 18, 1993, the State filed a Petition to Modify in this cause. A default judgment was taken against defendant on January 10, 1994, granting the State's Petition to Modify.

On May 16, 1994, defendant filed the Petition which is the subject matter of the cause now before this court. This court on its own motion joined the minor child herein as a party to this action and appointed a guardian ad litem for the child. By way of her guardian, the child

raises the issue of the constitutionality of the statute on which defendant's claim is based in this matter.

The Guardian ad Litem raises three issues regarding 1994 Ala. Acts 94-633, hereinafter referred to as Act 94-633.

I.

The first issue raised is whether or not Act 94-633 violates the public policies of this state which favor the legitimization of children and the need for finality of judgments. It is clear to this court that the law of Alabama strongly favors the legitimacy of children, allowing strong presumptions in the Uniform Parentage Act, Section 26-17-1 et seq., Code of Alabama 1975, in order to protect children and their relationships with their parents. It is also clear that by enactment of Act 94-663, the legislature seeks a route by which a defendant father may bastardize a legitimate child by reopening a paternity finding if accepted scientific evidence is available to the father showing that he has been excluded from the possibility of being the father.

Act 94-633 sets no time limitation on the filing of said motion after a finding of paternity. In the case at hand, eight years have elapsed since the defendant by his own admission became the legal father of Kenisha McClain. The guardian ad litem argues that such an open ended remedy leaves no finality of any judgment of paternity in this state, leading parties to such actions to be unable to rely on these judgments.

The guardian also raises the issue of the social, legal and financial ramifications of the action on the stability of families. In the case at hand, the defendant apparently acknowledged his fatherhood of the minor child for some time, visiting with her and contributing to her support. The guardian further argues that Act 94-633 at-

tempts to thwart public policy by allowing defendant fathers to untie emotional and legal bonds established between themselves and their children at any time in their childrens' lives so long as the fathers can obtain scientific testing with the consent of the mother.

The Defendant father argues that the facts of the case before this court work a grave injustice on him and on all defendant fathers similarly situated and that the public policy issue favoring the legitimacy of children should be set aside because, in this situation, justice and equity require it. Defendant further argues that Act 94-633 supplies a remedy to correct this injustice, thereby promoting public confidence in the fairness of the justice system and the truthfulness of judgments in general. Defendant further argues that to allow a judgment to stand which the courts know is incorrect creates a sham and perpetuates an injustice in a system the function of which is to seek the truth.

This court has not heard the evidence in this case but must assume that defendant herein has in his possession legally acceptable scientific evidence which excludes him as being the biological father of the minor child herein. Therefore, this court must decide whether the defendant's right to reopen this paternity judgment in order to prove that he is not the father of this child after eight years ago admitting that he was is greater than the child's right to her legitimacy and the public's right to rely on the finality of judgments of paternity, whether in the family courts, the divorce courts or the probate courts of this state.

It is with difficulty that this court decides this issue. No court wishes to ever knowingly perpetuate an untruth, such as may be the case herein should defendant not be the biological father of this minor child. However, there are issues of enormous consequence argued by the guardian ad litem and the State regarding the public

policy strongly favoring the legitimacy of children and the right to rely on the finality of judgments.

Act 94-633 does not limit itself to judgments obtained by fraud on the court or deception. This act allows defendant fathers a second chance in every paternity case ever entered in this state to reopen the judgment and set it aside without limitation as to time and without respect for relationships and family bonds. The act does away with the concept of *res judicata* and opens the courts of this state to new trial on all paternity judgments.

Given the basis for the public policy favoring the legitimacy of children which is to insure the stability of families and of society itself and given the fact that the right to rely on the finality of judgments except in specific and timely circumstances is the cornerstone of the American judicial system, this court finds that Act 94-633 is unconstitutional as it violates these two principles.

This court is not without concern for the plight of the defendant father in this cause. It is understandable that he believes that he has been done an injustice by the legal system and that to allow the original judgment in this cause to stand perpetuates an untruth. However, this defendant father came before this court eight years ago and entered his admission of paternity as regards the minor child herein. This court and society had every reason to rely on his word and since that time a relationship has formed.

Through Act 94-633, the legislature has attempted to allow this father and all those after him to set aside long standing policy regarding legitimacy of children and the reliability and finality of judgments in order for them to change their minds. Given these circumstances, the act is unconstitutional.

II.

The guardian ad litem next argues that Act 94-633 is unconstitutional as it denies equal protection of the laws pursuant to the Alabama and United States Constitution.

In response, Defendant asserts that the Constitution of Alabama of 1901 has no equal protection clause and that Alabama courts must look to Amendment XIV of the United States Constitution for guidance in this matter. The guardian counters that through case law relying on Article I of the Alabama Constitution of 1901, equal protection of the laws is guaranteed to the citizens of Alabama. Be that as it may, this court finds that equal protection of the law is enjoyed by each citizen of this state and that Act 94-633 should be examined in light of that principle.

Act 94-633, Section I. (a) states that "Upon petition of the defendant in a paternity proceeding where the defendant has been declared the legal father, the case shall be reopened if there is scientific evidence presented by the defendant that he is not the father." Clearly, this act limits access to the process it establishes to only defendants who are also fathers and thereby creates a classification which allows differential treatment to defendant fathers as opposed to plaintiff fathers, plaintiff mothers, defendant mothers and all children involved in paternity actions.

The guardian asserts that the classification of defendant fathers to the exclusion of all other parties creates an arbitrary classification which is unreasonable and also denies equal protection of the laws to other parties, specifically women and children.

As to the issue of whether or not the classification of defendant fathers is arbitrary and unreasonable, this court finds that the test for such a classification is whether or not the differential treatment provided to the

defendant father is reasonably related to the stated objective of the act. Further, it must be decided whether the benefit bestowed upon society by the act and classification outweighs the detriment to private rights occasioned by the statute.

The objective or purpose of Act 94-633 is stated in its first paragraph. This purpose is to provide a remedy for relief from judgment for defendant fathers who, armed with scientific evidence, no longer believe that they are the biological fathers of their children. As defendant states in his brief, the benefits bestowed upon society are to assure justice, promote public confidence in judgments, and remedy an injustice. This court agrees with defendant that these benefits are important.

However, this court cannot find that limiting the classification of parties who may utilize the remedy provided in Act 94-633 to defendant fathers outweighs the detriment to the private rights of the other parties to a paternity action. There is no rational relation between the classification of defendant fathers and the policy or objective sought to be implemented by the act.

Further, this court finds that the classification of males only in Act 94-633 acts to exclude females from the remedy. Such a result creates a gender classification which this court finds is not permissible, particularly in a statute which involves the rights of families. The guardian also argues that the classification discriminates against the rights of the child in this case. Although this court does not believe that children's rights are recognized by law as creating a suspect classification requiring extraordinary scrutiny by the courts, this court does find that the courts of Alabama have recognized the rights of the child in paternity a party with equal standing. Act 94-633 also excludes children from the remedy granted to defendant fathers.

Therefore, this court finds that Act 94-633 denies equal protection of the law to mothers, both plaintiffs and defendants, and to children. In fact, the act also denies this protection to fathers who may be plaintiffs in paternity actions. This court finds this denial unconstitutional.

III.

The guardian ad litem argues that Act 94-633 is so ambiguous as to render it unconstitutional. Specifically, the guardian refers to the meaning of *paternity proceeding* and *scientific test recognized by the court* in the act.

This court finds that although these phrases lack specificity, they are not so vague or ambiguous as to render the act unconstitutional.

The State of Alabama through the Assistant Attorney General submits that Act 94-633 should be considered to be prospective rather than retroactive. The State also asserts that the Constitution of Alabama of 1901, Art. IV, Section 95 prohibits the retroactive application of Act 94-633. The State moves to have the petition filed in this cause dismissed or denied based on these arguments.

The State argues that retroactive application of a statute is not favored absent clearly expressed legislative intent to create such an application. Further, the State submits that a statute should be regarded as solely prospective when the effect of giving it retroactive operation would be to discharge a vested right.

This court finds that Act 94-633 is intended by the legislature to be retroactive in its application. It is a remedial statute by nature which seeks to remedy presumed past injustices to defendant fathers by means of scientific evidence without regard to lapse of time. The State asserts that such a statute impairs the vested rights of the

child to legitimacy and paternal affiliation and the plaintiff mother's right to rely on the judgment of paternity.

This court has previously found in this order that Act 94-633 violates public policy favoring the legitimacy of children and the finality of judgments. The State asks this court to find that the child's right to legitimacy and to rely on judgments is a vested right which may not be impaired by acts of the legislature retroactively applied. This court cannot find that in this matter.

Motion by the State to dismiss or to deny the petition in this cause is therefore denied.

Therefore, Act 94-633 is hereby found to be unconstitutional for the above stated reasons and the Petition to Reopen Paternity Case is hereby denied.

Done and Ordered this the 22nd day of November, 1994.

/s/ Sandra H. Ross
Sandra H. Ross
Circuit Court Judge

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 1995

2940266

K. M.

v.

G. H.

2940267

State of Alabama, ex rel. G. H.

v.

K. M.

Appeals from Jefferson Family Court
(JU-86-127.06)

ROBERTSON, Presiding Judge

This is an appeal from a proceeding wherein the trial court declared an act of the legislature to be unconstitutional.

In 1992 and 1993, this court, in State ex rel G.J. v. W.J., 622 So. 2d 353 (Ala Civ. App 1992), and the Alabama Supreme Court, in *Ex parte W.J.*, 622 So, 2d 358 (Ala. 1993), refused to allow the trial court to grant the defendant, who had been declared the legal father of a minor child, Rule 60(b), Ala.R.Civ.P., relief from a prior adjudication of paternity, even though the defendant had scientific evidence that he was not the father of the child.

In 1994, the Alabama Legislature enacted, and the Governor signed into law on April 26, 1994, Act No. 94-633, Ala. Acts 1994 (Act), codified as § 26-17A-1, Ala. Code 1975, which provides:

"(a) Upon petition of the defendant in a paternity proceeding where the defendant has been declared the legal father, the case shall be reopened if there is scientific evidence presented by the defendant that he is not the father. The court shall admit into evidence any scientific test recognized by the court that has been conducted in accordance with established scientific principles or the court may order a blood test, or a Deoxyribose Nucleic Acid test of the mother, father, and child. Whenever the court orders a test and any of the persons to be tested refuse to submit to the test, the fact shall be disclosed at the trial, unless good cause is shown.

"(b) The test shall be made by a qualified expert approved by the court. The expert may be called by the court or any party as a witness to testify to the test results and shall be subject to cross-examination by the parties. The test results may be admitted into evidence. If more than one test is performed and the results are conflicting, none of the test results shall be admissible as evidence of paternity or nonpaternity.

"(c) Compensation of the expert witness shall be paid by the petitioner.

"(d) In the event the child has been adopted the matter of paternity may not be reopened under this chapter."

Based on this Act, K.M., the defendant in this paternity action, filed a petition to reopen this case because there was scientific evidence that he was not the father. Attached to the petition was a human leukocyte antigen (HLA) test which excluded him as being the father of K.H., the minor child at issue in this case.

In response to the petition, the State moved to dismiss, alleging that the Act had only prospective application. The trial court made the child a party to the action and appointed a guardian ad litem (GAL) for the minor child. The GAL challenged the constitutionality of the Act on the grounds that it is "vague, ambiguous and has a plain indeterminable meaning" and that it "creates a denial of equal protection under the laws." The State filed a memorandum brief, arguing that the Act applies prospectively only, that the Alabama Constitution of 1901 prohibits the retrospective application of the Act, and that the bastardization of children is against public policy The GAL's memorandum brief argued that the Act violates the public policy of this state, that it denies the equal protection guaranteed under the Alabama Constitution of 1901 and the United States Constitution, and that it is vague and ambiguous

K.M. argued in his reply brief that before the Act there existed a situation in which the Alabama appellate courts, in following the common law as in *Ex parte W.J., supra,* were "required to perpetuate an injustice.In other words, an injustice existed for which there was no relief available." K.M. contended that clearly, "these are the instances in which the legislature is bound to exercise its authority to make corrective measures. In this instance the corrective measure was to provide an extraordinary remedy under which a father-defendant may reopen a paternity case where there is [scientific evidence] that he is not in fact the father...."

Following oral argument of counsel and submission of the briefs, the trial court entered an order, finding (1) that the Act is unconstitutional because it violates the public policy favoring the legitimacy of children and the right to rely on finality of judgments; (2) that, through case law, the Alabama Constitution of 1901 provides for equal protection of the law to each citizen of this state

and that the Act is unconstitutional on that ground; (3) that the Act is not so vague or ambiguous as to render it unconstitutional; and (4) that the legislature intended the Act to be retroactive in its application and that it was not unconstitutional on that ground (the State's motion to dismiss on this ground was denied). The trial court, ex mero motu, entered an amendment to the order, finding (5) that the Act violates the full faith and credit clause of the United States Constitution because of the Reciprocal State Enforcement of Duty to Support Act, URESA, an act originally enacted by the Alabama Legislature in 1951.

K.M. appeals. The State cross-appeals, raising one issue, the retrospective application of the Act. The GAL did not cross-appeal, consequently, there is no challenge to the trial court's finding that the Act is not vague or ambiguous.

For the background facts of this case, see *E.B.M v. V.W.*, 586 So. 2d 230 (Ala Civ. App 1991). It is unnecessary to repeat all of those facts in this opinion, because the sole issue before this court is the constitutionality of the Act, i.e., § 26-17A-1, Ala. Code 1975.

We first point out that it is a well established principle of law that it is the duty of the trial courts and the appellate courts of this state to sustain the constitutionality of a legislative act unless it is clear beyond a reasonable doubt that it is in violation of the fundamental law. *Crosslin v. City of Muscle Shoals*, 436 So. 2d 862 (Ala. 1983).

PUBLIC POLICY

K.M. contends that the trial court erred in finding that the Act violates the public policy of the State of Alabama. The State argues that the Act violates the strong public policy which favors the legitimation of children and the public policy in favor of the finality of judgments.

We first note that pursuant to its authority, the Alabama Supreme Court promulgated Rule 60, Ala.R.Civ.P., which provides for relief from certain judgments and which, in certain cases, can affect the finality of judgments of legitimation. *Ex parte State ex rel. McKinney*, 575 So. 2d 1024 (Ala. 1990). Does the Alabama Legislature have *equal* authority to amend the Alabama Uniform Parentage Act, §§ 26-17-1 et seq., Ala. Code 1975, so as to provide for certain relief in order to undo an injustice in very special circumstances? We think so.

"When the legislature of a state has acted on a subject within constitutional authority, public policy is what the statute enacted says or indicates. Thus a constitutional statute cannot be contrary to public policy—it is public policy." *Higgins v. Nationwide Mutual Insurance Co.*, 50 Ala. App. 691, 694, 282 So. 2d 295, 298 (1973).

We find a part of K.M.'s brief on appeal, as it relates to the public policy established by this Act, worthy of quoting:

> "In that regard, it is important to understand that these extraordinary remedies manifest a more important public policy than any of the ones cited by the Trial Court. That public policy involves ensuring public confidence in the edicts of our courts. It is quite obvious that where blatant injustices are allowed to stand, there is an erosion in public support [and] confidence in our court system. Accordingly, where, as in the instant case, the [defendant] can be conclusively established as a matter of fact not to be the father of a child and to be required to 'in law' be the father of a child, it lessens the respect on which the decisions of the court are given. Thus, these extraordinary remedies which have been carved out by the legislature and the courts to attack judgments which are clearly inconsistent with the 'finality of judg-

> ments,' are designed to provide mechanisms by which justice is assured. Their availability to correct obvious injustices within our Courts are an essential cornerstone of Anglo-American jurisprudence. It is axiomatic, that where there is no remedy, there is no right. In this regard, the Alabama Legislature was acting in accord with the most basic principles in our society in providing a remedy to correct an obvious injustice and vindicate a right. That remedy is narrowly circumscribed and of limited availability."

The trial court erred in holding that the Act violates the public policy of the State.

EQUAL PROTECTION

K.M. contends that the trial court erred in holding that the Act denies equal protection of the laws in violation of the Alabama Constitution of 1901 and the United States Constitution. We first point out that the trial court did not find that the Act violates the equal protection clause of the United States Constitution; instead, the trial court found that the Act violates the equal protection guaranteed to Alabama citizens by the Alabama Constitution of 1901 because it denies equal protection to fathers who are plaintiffs, and to mothers and children.

K.M. correctly points out that there is no equal protection clause in the Alabama Constitution of 1901. See *Ex parte Bronner*, 623 So. 2d 296 (Ala. 1993) (Houston, J., concurring in the result). However, our Supreme Court has held that "Sections 1, 6, 22, State Constitution; Amendment 14, Federal Constitution ... taken together guarantee the equal protection of the laws ...." *Pickett v. Matthews*, 238 Ala. 542, 545, 192 So. 261, 264, (1939). Later, our Supreme Court held: "Sections 1, 6, and 22 of the Alabama Constitution combine to guarantee equal protection of the laws. The essence of the theory of equal

protection of the laws is that *all similarly situated* be treated alike. An individual cannot be subjected to arbitrary exercise of governmental powers." *City of Hueytown v. Jiffy Chek Co.*, 342 So. 2d 761, 762 (Ala 1977) (emphasis added) (the 14th Amendment to the U.S. Constitution was omitted); see also *Black v. Pike County Commission*, 360 Ala. 303 (Ala. 1978). *"All similarly situated"* individuals under this Act are defendants who have been declared the legal father of a child and who have scientific evidence that they are not the child's father; each has equal protection under this Act. The Act does not allow the trial court to arbitrarily apply the Act to certain defendant-fathers and to deny other similarly situated defendant-fathers relief under the Act.

Further, the Alabama Legislature is presumed to have acted within its constitutional power in passing laws, even though in practice their laws result in some inequality, and "a statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it." *State v. Colonial Pipeline Co.*, 471 So. 2d 408, 412 (Ala. Civ. App. 1984). Paternity proceedings are unique and different from all other legal actions. In ordinary civil actions there can be joint tort-feasors or disputable facts which may change as witnesses or parties age. In a paternity proceeding, however, there can be only *one* natural or biological father of a child. The legislature has liberally given many entities the right to bring paternity actions against putative fathers to determine paternity and to establish support for a child. See the Alabama Uniform Parentage Act, §§ 26-17-6 and 26-17-9, Ala. Code 1975.

The Alabama Legislature has now seen fit to enact legislation whereby, in exceptional cases and to remedy injustices, a defendant, who has been wrongfully accused and declared to be the legal father of a child but who later has scientific evidence that he is not the father, may reopen the case. Plaintiff-fathers, mothers, and children

are also protected under the laws of this state when there is scientific evidence that the plaintiff-father is not the natural father, or that the defendant-father is not the natural father when the mother or some other entity was the plaintiff; they may seek Rule 60(b), Ala.R.Civ.P., relief. *Ex parte W.J., supra.* It is clearly within the legislature's power to enact laws to ensure justice and to correct an injustice under a prior act of the legislature and not be in violation of §§ 1, 6, and 22 of the Alabama Constitution of 1901, since "all similarly situated" individuals have equal protection under the Act.

We further point out that the Act extends protection to the mother and others. Section 26-17A-2 provides:

> "In any decree setting aside an order of paternity pursuant to this chapter, there shall be no claim for damages against the court rendering the initial order of paternity nor any reimbursement or recoupment of money or damages against the mother, the State, or any employee or agent of the State "

The only kind of judgment that can be reopened or affected by this Act is a paternity judgment where the defendant has been wrongfully accused and there is scientific evidence that the defendant is not the father, i.e., the judgment is *unjust.* The relief is very limited; he can only reopen the case. § 26-17A-1. The Act cannot affect that judgment as far as money already paid to and received by the mother, because there can be no reimbursement or recoupment of money or other damages (false accusation) against the mother; the mother is protected under the Act. § 26-17A-2.

We point out that not only can scientific testing determine the non-existence or probable-existence of the father-child relationship, but it can also determine the probability of hereditary defects or diseases which may be

detected and prevented in the child; therefore, the child benefits under this Act by the *truth* being established.

The trial court erred in holding that the Act violates the equal protection guaranteed to Alabama citizens by the Alabama Constitution of 1901.

RETROACTIVE APPLICATION

The State argues that the Act, if applied in the present case, will violate Art. IV, § 95, Ala. Const. 1901, which provides that:

> "There can be no law of this state impairing the obligation of contracts by destroying or impairing the remedy for their enforcement; and the legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this state. After suit has been commenced on any cause of action, the legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit."

The State contends that the Act may not revive K.M.'s right to challenge the paternity judgment after having failed to file a timely appeal from the paternity judgment. Why would a defendant admit paternity and immediately file an appeal? In any case, no legal authority is cited to support the State's contentions on this issue; it is clear from the plain reading of the Act that it was intended to be applied retroactively. We affirm the trial court on this issue. *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263 (Ala. 1981).

FULL FAITH AND CREDIT CLAUSE

The record and the pleadings do not reflect that any of the parties challenged the Act on this ground, unless it

was done orally and without the benefit of a court reporter. Neither the State nor the GAL cites this court any authority in briefs to support this finding. Since the judgment at issue in this case is an Alabama judgment, no one had standing to challenge the constitutionality of the Act based on the Full Faith and Credit Clause of the United States Constitution. "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Clements v. Flashing*, 457 U.S. 957, 966 n.3, 102 S.Ct. 2836, 2845 n.3, 73 L.Ed.2d 508 (1982) (citations omitted). Anyway, the trial court found the Act to be unconstitutional because of another legislative act, URESA, codified as §§ 30-4-80 through 98; however, no authority is cited for such a holding. Consequently, the trial court erred by holding the Act unconstitutional on this ground. We point out to the trial court that a constitutional act may be applied in an unconstitutional manner. *Id.*

We find that the State and the GAL have failed to establish by the necessary burden of proof that the Act is unconstitutional. The trial court erred in holding that the Act violates the public policy of this state, that the Act denies equal protection of the laws of this state, and that the Act violates the Full Faith and Credit Clause of the United States Constitution. The trial court did not err in holding the Act to be constitutionally retroactive. We hold that the Act is constitutional.

The trial court's judgment is affirmed in part and reversed in part, and this case is remanded for further proceedings pursuant to § 26-17A-1, Ala. Code 1975.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Yates, and Monroe, JJ , concur.

Thigpen, J., concurs in the result.

Crawley, J., dissents.

CRAWLEY, Judge, dissenting.

I agree with the statement in Presiding Judge Robertson's opinion that it is our duty to sustain the constitutionality of a legislative act unless it is clear beyond a reasonable doubt that the act is in violation of fundamental law. I dissent because I believe it *is* clear beyond any reasonable doubt that the Act is unconstitutional. The Act subverts the principle of res judicata, denies equal protection of the laws to other similarly situated individuals, and violates the separation of powers provisions of the Alabama Constitution.

Res Judicata

The principle of res judicata bars a paternity plaintiff, mother or child, from relitigating her action against an exonerated paternity defendant, and — unless Rule 60 (b) affords relief — that principle also bars a paternity defendant from relitigating the action. This court has already decided that K.M. is barred from relitigating the question of the paternity of K.H. In *E.B.M. v. V.W.*, 586 So. 2d 230 (Ala. Civ. App. 1991), we held that the paternity issue *in this case* was res judicata.

The act undermines our holding in *E.B.M.* and subverts the principle of res judicata, an affirmative defense enumerated in Rule 8 (c), A.R.Civ.P. The Act thereby violates Art. IV, § 95 of the Alabama Constitution, which states that "the legislature shall have no power to . . . destroy any existing defense to [a] suit."

Presiding Judge Robertson's opinion emphasizes that the Act is a narrow remedy aimed at righting a specific injustice. The opinion fails to point out, however, that K.M. has already had at least two opportunities to right

the injustice of being declared the legal father of a child who is not his biological offspring.

In 1986, the State of Alabama ex rel. G.H. filed a paternity action against K.M., alleging that K.M. was the father of K.H., a child born in 1985. K.M. acknowledged paternity and, on May 9, 1986, the family court entered a judgment of paternity and an order of support. K.M. did not appeal.

A year later, in 1987, K.M. filed a motion for relief from the child support order, and, in 1988, a motion to set aside the original paternity adjudication. He attached to his motions the results of an HLA blood typing test that excluded him as the natural father of K.H.[1] The family court denied his motions on August 16, 1988. K.M. appealed to the circuit court on October 19, 1988, but on March 29, 1989, the circuit court dismissed the appeal as untimely because K.M. did not file his notice of appeal within 14 days of the family court's order. See Rule 28 (C), Ala.R.Juv.P. K.M. did not appeal that dismissal.

In 1990, K.M.'s parents attempted unsuccessfully to reopen the paternity case. They filed an action, styled as a petition by the minor child K.H. through her paternal grandparents, alleging that K.M. was not the father of K.H., and seeking to have the adjudication of paternity set aside. The family court ruled that the prior paternity adjudication was res judicata and dismissed the petition. K.M.'s parents appealed the dismissal, and this court affirmed in *E.B.M. v. V.W.*

K.M did not appeal the 1986 adjudication of paternity or file a timely appeal from the denial of his 1987 and 1988 motions to have the paternity adjudication set aside. He has already had opportunities to prove his non-paternity of K.H. by scientific test results. He has simply failed

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[1]This test, dated 1987, was also attached to his present motion to reopen the paternity proceedings.

to follow up on those opportunities. Under a "due diligence" analysis, K.M. would not be entitled to Rule 60(b) relief.

Unlike Rule 60(b), which requires that the moving party be diligent in protecting his interests and file a motion within four months or within "a reasonable time," the Act at issue here provides no time limit for reopening a paternity action and states no requirement regarding the defendant's diligence or lack of diligence in defending against the first action, filing an appeal, or seeking a blood test at the earliest opportunity.

At some point — and I think that point is defined within the parameters of Rule 60 (b) — the law must be more concerned with finality than it is with doing justice to one who is not diligent in protecting his own rights. There is "no general equitable doctrine . . . which countenances an exception to the finality of a party's failure to appeal." *Federated Dep't Stores. Inc. v. Moitie*, 452 U.S. 398, 400, 101 S.Ct. 2424, 2429, 69 L.Ed.2d 103 (1981). In *Moitie*, the Supreme Court observed:

> "The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply 'no principle of law or equity which sanctions the rejection . . . of the salutary principle of res judicata.'"

Presiding Judge Robertson's opinion states that the Act is an amendment to the Alabama Uniform Parentage Act (AUPA) and is no less constitutional than the AUPA. However, the AUPA outlines the parties who can *initiate* a paternity action; it does not mandate the reopening of a final judgment or void the defense of res judicata.

Equal Protection

I agree with Presiding Judge Robertson's observation that the essence of equal protection jurisprudence is that all similarly situated individuals should be treated alike. For purposes of this case, "other similarly situated individuals" are, at the very least, those persons who were parties to a prior paternity proceeding in which the outcome is contradicted by scientific evidence.

A plaintiff mother or child who has scientific proof that a man found *not* to be the father in a prior paternity action is in fact the father, is "identically situated" with a defendant who has been declared the legal father of a child but has scientific evidence that he is not the father. Each party claims the result of the paternity proceeding is unjust.

By allowing only the defendant to establish the justice of his claim, however, the Act treats a former paternity defendant (a male) differently from a former paternity plaintiff (most often a female or an illegitimate child). In equal protection analysis, statutory classifications based on gender or legitimacy are subject to an intermediate level of scrutiny; they must be "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988).

The objectives of the act — to remedy the injustice of erroneous paternity determinations and to promote public confidence in the judicial system — are important ones. The classifications established by the legislature, however, are not "substantially related" to achieving those objectives. By allowing only one group of people affected by erroneous paternity determinations — defendant "fathers" — to refute those determinations with scientific evidence, the Act guarantees that the goals of truth and public confidence are achieved for only *some* of the erroneous judgments. Because the legislative classifi-

cations do not significantly advance the legislative goals of the Act, the classifications are not substantially related to achieving those goals, and the Act denies equal protection to the excluded categories of litigants. See *Hall v. McBride*, 416 So.2d 986 (Ala. 1982); *Orr v. Orr*, 374 So. 2d 895, 896 (Ala. Civ. App.), cert. denied, 374 So. 2d 898 (Ala. 1979).

> "When a statute is defective because of underinclusion, a court has two alternatives: 2940266 & 2940267
>
> > "1) The Court may declare the statute a nullity, and order that its benefits not extend to the class, and
> >
> > "2) The Court may extend the benefits of the statute to include those who are aggrieved by the exclusion."

Hall v. McBride, 416 So. 2d at 990-91. See also *Orr v. Orr*, 374 So. 2d at 896.

It might be possible to remedy the underinclusiveness of the Act by extending its benefits to mothers and children affected by erroneous paternity determinations. The reason for extending a statute's benefits to the excluded classes is to redeem a statute, which would otherwise be constitutional, from invalidity. In this case, however, curing the Act's equal protection infirmity would not restore it to constitutional health.

Separation of Powers

The Act suffers from another fundamental flaw. It violates the principles underlying Article III, §§ 42 and 43, of the Alabama Constitution of 1901.

Section 42 reads:

> "The powers of the government of the State of Alabama shall be divided into three distinct

> departments, each of which shall be confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Section 43 reads:

> "In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

The Act directs that "[u]pon petition of the defendant in a paternity proceeding where the defendant has been declared the legal father, *the case shall be reopened* if there is scientific evidence presented by the defendant that he is not the father." (Emphasis added.)

Over 125 years ago, the Alabama Supreme Court determined that the legislature could not, without violating the separation of powers provisions of the Alabama constitution, pass an act that required a trial court to reopen a case and grant a new trial. In *Sanders v. Cabaniss*, 43 Ala. 173 (1869), the court examined the constitutionality of a post-Civil War act "to declare void certain judgments, and to grant new trials in certain cases." 43 Ala. at 174-75. The act provided

> "[t]hat any judgments or decrees rendered since the 25th day of May, 1865, when the original cause of action originated prior to that date, . . . shall be opened on application [to the judge of the court having jurisdiction], accompanied

with an affidavit that such cause of action did originate prior to the 25th day of May, 1865."

43 Ala. at 177 Our supreme court observed:

> "If in passing this [act] the general assembly exercised a judicial, and not a legislative power; then we have no choice left to us in the matter, but are bound to declare it void . . . . All the powers of the government, under the constitution, belong properly and exclusively to either the one or the other of the departments named, and none of said powers can be both judicial and legislative."

The court held that the act was unconstitutional because it represented a "clear and undoubted exercise of judicial powers on the part of the legislature," 43 Ala. at 188, and, therefore, violated the separation of powers doctrine:

> "[T]he manifest purpose of the legislature, in the passage of this act, was to effect an opening and setting aside of certain judgments and decrees, and to grant new trials and rehearings, by peremptorily commanding it to be done by the courts and judges, without permitting them to exercise any judgment in the matter . . . .
>
> "If there can be any doubts on this subject they are cleared away and removed, by reference to the title of the act, which is 'An act to declare void certain judgments and to grant new trials in certain cases therein mentioned.' To do this is clearly to exercise a judicial, and not a legislative power; a power that legitimately belongs to courts and judges."

43 Ala. at 186. Observing that it was "constrained, by a high sense of duty," the Alabama Supreme Court reached the separation of powers question despite the

fact that it was not argued as a ground for reversal by the parties. 43 Ala. at 188.

In *Ratcliffe v. Anderson*, 31 Gratt. 105, 72 Va. 105 (1878), the Virginia Court of Appeals struck down a similar act that authorized the reopening of judgments rendered since March 3, 1866. In that case, a debtor wished to reopen a cause after final judgment in order to show that he and his creditor had contracted with the understanding that Confederate currency was the standard of value, and that his debt should be reduced from its nominal amount to its post-War depreciated value. The Virginia court held:

> "[T]he act is an attempted exercise of judicial power because it authorizes a court to reopen and review a case which has already passed into judgment. It is now too well settled to admit of serious dispute that the legislative department can no more exercise judicial power than that the judicial department can exercise legislative power. Each is supreme in the exercise of its own proper functions within the limits of its authority. The boundary line of these powers is plainly defined in every well-ordered government; and in this country it is now a well-established principle of law that the three great powers of government — the legislative, the executive, and the judicial — should be preserved as distinct from and independent of each other as the nature of society and the imperfections of human institutions will permit. That system which best preserves the independence of each department approaches nearest to the perfection of civil government and the security of civil liberty."

31 Gratt. at 107, 72 Va. at ——. The author of the opinion for the Virginia court continued:

> "In the case before us the legislature interfered to provide a new remedy for the benefit of a class of persons to obtain a rehearing in suits in which judgments and decrees had been made, and became final against them. . . .
>
> Both upon principle and authority I conclude that the legislature has no right, directly or indirectly, to annul in whole or in part a judgment or decree of a court already rendered, or to authorize the courts to reopen and rehear judgments and decrees already final, by which the rights of the parties are finally adjudicated, . . . and that every such attempt of legislative action is plainly an invasion of judicial power, and therefore unconstitutional and void."

31 Gratt. at 111, 72 Va. at ——.

In *Lawson v. Jeffries*, 47 Miss. 686, 12 Am. Rep. 342 (1873), the Mississippi Supreme Court held that the following legislative ordinance violated the separation of powers provisions of both the state and federal constitutions:

> "[I]n all cases where judgments in the circuit courts and decrees in the chancery or probate courts of this state have been rendered since the 9th day of January, 1861, and prior to this date, the party against whom such judgment or decree has been rendered, . . . shall be entitled to a new trial upon filing an affidavit that he or she had no attorney or counsel present at the time of the rendition of said judgment or decree, and that he or she believes that said judgment or decree is unjust."

47 Miss. at 691, 12 Am. Rep. at 343. The court framed the question presented as follows: "whether . . . any legislative body can, by an ordinance or statute, award a new trial absolutely." 47 Miss. at 694, 12 Am. Rep. at 345. The

court answered that question in the negative, holding that the ordinance was "a judicial, and not a legislative act, and, therefore, unauthorized." 47 Miss. at 693, 12 Am. Rep. at 345.

In holding the ordinance beyond the scope of legislative authority, the Mississippi court rejected the following arguments, which have, in substance, been made in the case now before us: (1) that "[t]he allowance of a new trial . . . gives the opportunity of ascertaining the righteousness of judgments under circumstances presumed to be more favorable to investigation," 47 Miss. at 688 (here, a new trial for K.M. gives the court the opportunity to ascertain the true paternity of K.H. by using scientific test results not introduced at the first paternity proceeding); and (2) that "the [legislative body] did not grant new trials. It provided by law for the granting of new trials by the courts on a proper showing by a party to the suit," 47 Miss. at 689 (here, a new trial is available for K.M. only if he presents scientific evidence that he is not the father of K.H.). The Mississippi court concluded:

> "'If a review of such judgments may be ordered for one cause, it may be equally so for another, or any cause within the discretion of the legislature.' . . . If a legislative body may grant a new trial, it may order a continuance, annul a judgment, suspend a trial, direct the judgment to be entered, and otherwise interfere with the discretion and independence of the judiciary. The evils that would flow from such an assertion of legislative power are too apparent to be enumerated. . . . "

47 Miss. at 701, 704, 12 Am. Rep. at 351, 353.

Long before the post-Civil War "new trial" cases, the proposition that a legislature could not, without violating the separation of powers doctrine, order a court to grant a new trial was established. In *Merrill v. Sherburne*, 1

Adams 199, 8 Am. Dec. 52 (N.H. 1818), the Supreme Court of New Hampshire considered the constitutionality of a statute granting a new trial to the losing party in a probate proceeding. The court noted that the act "does not empower the court in their discretion to grant or refuse a new trial; but directs that 'the cause shall be heard' again; and thus amounts to an absolute reversal of the judgment . . . ." 1 Adams at ——, 8 Am. Dec. at 55. The New Hampshire court stated that "[s]uch being the operation of the act, it becomes proper to examine . . . [w]hether the passage of it was not an exercise of judicial powers." 1 Adams at ——, 8 Am. Dec. at 56. An examination of that question prompted the court to observe:

> "The grant of a new trial belongs to the courts of law from immemorial usage. The power to grant a new trial is incidental to their other powers. It is a judgment in relation to a private controversy, affects what has already happened, and results from a comparison of evidence and claims with the existing laws. It will not be denied that the consideration and decision by the superior court, of the motion for this same new trial was an exercise of judicial power. If so, a consideration and decision upon the same subject by the legislature must be an exercise of power of the same description; for what is in its nature judicial to-day, must be judicial to-morrow and forever. The circumstance, also, that the legislature themselves did not proceed to make a final judgment on the merits of the controversy between these parties, cannot alter the character of the act granting a new trial. To award such a trial was [a] judicial act."

1 Adams at ——, 8 Am. Dec. at 57-58. The court concluded that the act was a violation of the separation of powers principles that guaranteed three independent branches of government. It explained:

> "One prominent reason for creating the judicial distinct from the . . . legislative department, was that the former might determine when laws were thus 'repugnant [or contrary to the constitution],' and so operate as a check upon the latter, and as a safeguard to the people against its mistakes or encroachments. *But the judiciary would in every respect cease to be a check on the legislature if the legislature could at Pleasure revise or alter any of the judgments of the judiciary. The legislature, too, would thus become the court of last resort, 'the superior court,' or 'supreme judicial' tribunal of the state. . . .*"

1 Adams at ——, 8 Am. Dec. at 57-58, 61-62 (emphasis added). The New Hampshire court emphasized that its conclusion did not "by any means suppose a superiority of the judicial to the legislative power." 1 Adams at ——, 8 Am. Dec. at 55. Instead,

> "[i]t only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter rather than the former."

1 Adams at ——, 8 Am. Dec. at 55.

In 1952, the Alabama Supreme Court once again held that the legislature had violated the separation of powers doctrine by enacting a law that required the circuit courts to grant new trials under certain circumstances. Title 15, § 305, Code of Alabama 1940, provided that if the prosecutor in a criminal case made any comment on the accused's failure to testify, then "a new trial must be granted on motion filed within thirty days." *See Broadway v. State*, 257 Ala. 414, 60 So. 2d 701 (1952).

In *Broadway*, the court reasoned that the power of the circuit court to grant new trials derives from the constitu-

tion and not from the legislature; therefore, "*the legislature cannot take from courts power which it does not give.*" 257 Ala. at 418, 60 So. 2d at 704 (emphasis added by the court in *Broadway*). The court concluded:

> "It is with great regret that we are constrained to declare, as we have rarely done, that a legislative enactment hampers the orderly functions of constitutional courts in this State, but it becomes necessary for us to do so when a case arises, and we are satisfied beyond a reasonable doubt that such is a proper interpretation of the situation.
>
> "*To give [the statute] the effect which its language imports is to deprive the circuit court of its constitutional power to function in a judicial way in that respect.* It cannot be rightly conceived that there is legislative competency to create a duty on the part of such a court without exercising any discretion or judgment, when a performance of that duty is an exercise of the judicial function, and if it is performed a compliance would result in the duty to perform a ministerial act on the part of the court to grant a motion for new trial . . . . *Such, it seems to us, is so plainly an infringement by legislative power upon judicial power that we cannot afford to labor under it.* The Constitution which created the circuit court and this Court did not contemplate that it should be required to act ministerially in passing upon the rights and liberties of parties before those courts, when such act calls for a judicial function."

Broadway, 257 Ala. at 418, 60 So. 2d at 704-05 (emphasis added).

More recently, in *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991), our supreme court declared unconstitutional, on separation of powers

grounds, a statute that removed the presumption of correctness from post-verdict review of punitive damages awards. Armstrong challenged the constitutionality of the statute on a number of grounds, but he did not raise the separation of powers issue. The Alabama Supreme Court noted that "[n]ormally, a court will not hold a statute unconstitutional except on a basis specifically argued by a party and necessarily presented in the case." It observed, however, that "[t]his case presents a unique situation, however, because, . . . [i]f the [challenged statute] violate[s] the principle of separation of powers, that violation affirmatively intrudes into the judicial process even though §§ 42 and 43 of the Constitution have not been argued." *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d at 416.

I have found few other 20th century decisions holding that legislation mandating the reopening of a judgment or the granting of a new trial violates the separation of powers doctrine. The scarcity of recent cases, however, only convinces me that the proposition is so well established that it is no longer seriously open to question. In addition to the decisions of our own supreme court in *Broadway v. State* and *Armstrong v. Roger's Outdoor Sports, Inc.*, the supreme courts of Georgia and Massachusetts have also recently addressed the issue. See *Jenkins v. Jenkins*, 233 Ga. 902, 214 S.E.2d 368 (1975); *Spinelli v. Commonwealth*, 393 Mass. 240, 470 N.E.2d 795, 796 (1984).

In *Jenkins*, the Georgia court dealt with a challenge to a statute that changed the age of majority from 21 to 18 years. The statute provided that it had no effect on judgments entered before the effective date of the act. A father obliged by a divorce judgment to support his child until the age of majority argued that the statute discriminated against fathers who had been divorced before the effective date of the act. Rejecting that argument, the

Georgia Supreme Court observed that the statute could not have applied to judgments before the act took effect because "[t]he 'legislature has no constitutional power to construe or alter judgments.'" 233 Ga. at 903, 214 S.E.2d at 369 (citation omitted).

In *Spinelli*, the Massachusetts court struck down a statute that would have restored a dismissed case to the active docket of a trial court. The court observed:

> "The Legislature apparently felt that the judgment of dismissal unjustly deprived the plaintiff of his right to seek compensation for the taking of his property. To remedy that perceived injustice, it attempted to nullify the judgment by legislatively restoring the case to its status before the judgment was entered. But '[t]he judgment of a court must stand as final. It can be reversed, modified or superseded only by judicial process. It is wholly under the control of the judicial department of government. The Legislature cannot "supersede" a judgment of a court by its direct declaration to that effect.' Because the effect of [the statute] would be to annul the Superior Court judgment dismissing the case, the statute is an attempt by the Legislature to exercise a power that is exclusive to the judiciary, and thus the statute violates [the separation of powers provision of the Massachusetts constitution]."

Spinelli, 393 Mass. at 242, 470 N.E.2d at 796 (citation omitted). Holding that "[m]anifestly it is the exercise of judicial power to grant a new trial or a rehearing in a cause in the courts," 393 Mass. at 242, 470 N.E.2d at 796, the court further observed:

> "The Legislature may, in some circumstances, provide a legislative remedy where the courts have determined there is no judicial remedy. *It*

> *may not, however, instruct a court to provide a judicial remedy when that court has concluded that there is none, without violating [the separation of powers doctrine].*"

393 Mass. at 243, 470 N.E.2d at 797 (emphasis added).

The continued and unquestioned validity of the proposition that a legislature cannot order a court to reopen a final judgment and grant a new trial is further attested to by Professor Moore, in his treatise on the Federal Rules of Civil Procedure:

> "The separation of powers doctrine precludes a state legislature from invading the province of the state judiciary by annulling, modifying, or impairing a final judgment rendered by a court of competent jurisdiction of that state."

J. Moore, 1B *Moore's Federal Practice* ¶ 0.406[2] at 281 (2d ed. 1991).

In 1869, the *Sanders v. Cabaniss* court surmised that the Alabama legislature may have been moved to enact a law to reopen judgments that became final during the Civil War "by their sympathies, because of the embarrassed and suffering condition of the country." 43 Ala. at 189. I surmise that, in 1994, the Alabama legislature may have been moved to enact the Act by its indignation over the injustice of requiring a man who has scientific proof that he is not the father of a child to support that child. The *Sanders v. Cabaniss* court concluded, however, that "good intentions can not make an act valid, which the constitution declares void," 43 Ala. at 189. Under our constitution, I think this court must come to the same conclusion.

Despite the fact that the separation of powers issue was not specifically raised in this case, I believe that there are two reasons why the issue should be addressed. First, it is theoretically possible to remedy the underinclusiveness

of the Act and thereby cure the equal protection flaw in the Act, by extending its benefits to the excluded classes. That course of action would be fruitless, however, if — after the extension of benefits — the Act were still fundamentally flawed.

Second, while I agree with the Alabama Supreme Court that "[n]ormally, a court will not hold a statute unconstitutional except on a basis specifically argued by a party and necessarily presented in the case," *Armstrong v. Roger's Outdoor Sports. Inc.*, 581 So. 2d at 416, I find that this case, like *Armstrong*, "presents a unique situation, . . . because, . . . [i]f the [challenged statute] violate[s] the principle of separation of powers, that violation affirmatively intrudes into the judicial process even though §§ 42 and 43 of the Constitution have not been argued." 581 So. 2d at 416.

"[I]t has been the firm understanding of the courts in the interpretation of the constitution that those courts which derive their existence from the constitution, succeeding common law courts of historic origin, cannot have their functions and their orderly processes disturbed by any legislative enactment." *Ex parte Huguley Water System*, 282 Ala. 633, 639, 213 So. 2d 799, 805 (1968). "[S]carcely . . . any function . . . strikes closer to the heart of the judicial power" than the ability to grant or to deny a motion for new trial. *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d at 418.

When the judiciary ignores the encroachment on judicial processes that the Act represents, it undermines the system of checks and balances built into our system of government. "Courts have always exercised inherent power to protect [their] adjudicatory processes, to control such processes, [and] to ward off encroachments upon recognized judicial functions." *Morgan County Comm'n v. Powell*, 292 Ala. 300, 306, 293 So. 2d 830, 835 (1974). Accord *Agran v. Checker Taxi Co.*, 412 Ill. 145, 149,

105 N.E.2d 713, 715 (1952) ("[i]t is the undisputed duty of the court to protect its judicial powers from encroachment by legislative enactments, and thus preserve an independent judicial department"). "The concept of inherent power is not some device created by a power-hungry judiciary, but is a doctrine that is concomitant to the very structure of our tripartite form of government." *Morgan County Comm'n v. Powell,* 292 Ala. at 319, 293 So. 2d at 847 (Heflin, C.J., dissenting). Because I firmly believe that "[t]hat system which best preserves the independence of each department approaches nearest to the perfection of civil government and the security of civil liberty," *Ratcliffe v. Anderson,* 31 Gratt. at 107, 72 Va. at ——, I conclude that the independence of both the legislative and the judicial departments would be advanced by holding that the Act violates the separation of powers principles underlying §§ 42 and 43 of the Alabama Constitution.

Justice Houston, dissenting in *Armstrong v. Roger's Outdoor Sports, Inc.,* criticized the majority for reaching a constitutional issue that had not been raised below, but even he appeared to agree that a court may reach an unpresented constitutional question "if the law is so settled that awaiting a proper constitutional challenge would be an exercise in futility." *Armstrong v. Roger's Outdoor Sports, Inc.,* 581 So. 2d at 428 (Houston, J., dissenting). Here, the law is settled: the legislature may not, without violating the separation of powers doctrine, order a court to reopen a final judgment and grant a new trial. Based on the foregoing authorities, I believe that the Act violates §§ 42 and 43 of the Alabama Constitution of 1901 and is, therefore, unconstitutional.

D-1

IN THE SUPREME COURT OF ALABAMA

June 14, 1996

1950140

Ex parte State of Alabama, ex rel G. H. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: 2940266 K. M. v. G. H.; 2940267 State of Alabama, ex rel G. H. v. K. M.) (2940266; 2940267) (Jefferson: JU-86-127.06)

CERTIFICATE OF JUDGMENT

WHEREAS, on January 26, 1996, a Writ of Certiorari to the Court of Civil Appeals was granted by this Court, and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure,

WHEREUPON, come the parties and the Petition for Writ of Certiorari being submitted and duly examined and understood by the Court, it is considered by the Court that the writ heretofore issued should be quashed and that the petition should be denied.

IT IS, THEREFORE, CONSIDERED AND ORDERED that the Writ of Certiorari heretofore issued to the Court of Civil Appeals be, and the same is hereby, quashed, and the Petition for Writ of Certiorari be, and the same is hereby, denied. NO COSTS TAXED. NO OPINION.

COOK, J. - Hooper, CJ., Maddox, Almon, Shores, Houston, Kennedy, Ingram and Butts, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the

foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 14 day of June, 1996

/s/ Robert Esdale

Robert Esdale
Clerk, Supreme Court of Alabama